No. 90-311

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

BATEMAN EICHLER, HILL RICHARDS, INCORPORATED, JOHN R. BOLIN, THEODORE W. PRUSH,

Petitioners,

v.

JOHN D. RUOCCO, on behalf of himself and as representative of a class of persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a United States District Court can exercise jurisdiction under ERISA in a dispute by a former employee who has no colorable claim to any benefit according to the terms of the group disability policy at issue, the provisions of California's Insurance Code, or common law.

2. Whether ERISA preempts a provision of California's Insurance Code and similar provisions enacted in fourteen other states and territories providing that under certain circumstances, the employer is entitled to recapture a dividend paid by an insurer issuing a group disability policy to offset certain administrative costs.

3. Whether a District Court can properly issue an award of attorneys' fees against an employer under ERISA when the request for attorneys' fees was not briefed by either party, a final judgment has not been entered, it is uncertain that the plaintiffs will even prevail, and the District Court specifically found that the employer did not breach any fiduciary duty under ERISA and did not act in bad faith.

PARTIES TO THE PROCEEDING

The named appellants in the United States Court of Appeals for the Ninth Circuit were Bateman Eichler, Hill Richards, Incorporated ("BEHR"), John R. Bolin, and Theodore W. Prush. At the times relevant to this litigation, Bolin was BEHR's president, chief executive officer and chairman of the board. Prush was BEHR's executive vice president, chief financial officer and a member of BEHR's board. BEHR is a wholly owned subsidiary of Batehill, Inc., which is a wholly owned subsidiary of Kemper Financial Companies, Inc. Kemper Financial Companies, Inc. is a subsidiary of the Kemper Corporation.

The named appellee in the Court of Appeals was John R. Ruocco, who was employed by BEHR until August 1986. Ruocco represents himself and a class of approximately 2,000 BEHR employees who enrolled in a group long term disability policy issued by Union Mutual Insurance Company between January 1, 1982 and December 31, 1984.

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IN THE
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Bateman Eichler, Hill Richards, Incorporated, John R. Bolin and Theodore W. Prush (collectively "BEHR") respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on May 18, 1990. That judgment involves three

important questions under the Employee Retirement Income Security Act of 1974 ("ERISA"): (1) who is a "participant" in an employee welfare plan and what are the plan's "benefits" for purposes of the District Court's subject matter jurisdiction; (2) whether ERISA preempts a provision of the California Insurance Code and similar provisions enacted by fourteen other states and territories which permit an employer, under certain circumstances, to recover dividends distributed by an insurer issuing a long-term group disability policy to offset certain of the employer's administrative costs; and (3) whether an award of attorneys' fees was appropriate when the issue was neither raised nor briefed in the District Court, no final judgment has been entered, and the District Court found no evidence of bad faith or a breach of fiduciary duty.

The issues are important and recurring. The Ninth Circuit has extended the definitions of "participant" and "benefit" beyond the contours established in *Firestone Tire & Rubber Company v. Bruch* to include claims by former employees to money to which they admittedly are not entitled under any specific provision of the policy itself, under any specific provision of ERISA, or under common law. Since the jurisdiction of the District Court under ERISA depends upon the definitions of "participant" and "benefits," this first issue implicates the competing authority of state and federal courts. The Ninth Circuit also enlarged the scope of ERISA's preemption clause beyond the contours set forth in *Pilot Life Ins. Co. v. Dedeaux* and *Metropolitan Life Ins. Co. v. Massachusetts* to invalidate a provision of the California Insurance Code which establishes that present and former employees have no right under California law to dividends paid by an insurance carrier under the circumstances presented in this case. At least fourteen other states and territories have enacted

statutes similar to California's Insurance Code provision. (A30-31) Thus, the issue involves a question of national importance implicating the states' longstanding rights to enact laws governing matters of insurance.

Because of the complexity and novelty of these issues, the District Court certified its decision for an immediate appeal pursuant to United States Code, Title 28, section 1292(b). The Ninth Circuit accepted the appeal. Petitioners respectfully request that the Court issue a writ of certiorari to consider these novel and important issues under ERISA as well.

OPINIONS BELOW

The opinion of the United States District Court for the Central District of California is set forth in the Appendix to this Petition. (A18-28)[1] The opinion of the United States Court of Appeals for the Ninth Circuit, which affirmed in part and reversed in part the decision of the District Court, is also set forth in the Appendix and reported at 903 F.2d 1232. (A1-17)

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1990. The jurisdiction of this Court is invoked pursuant to United States Code, Title 28, section 1254(1). As explained below, BEHR contests the jurisdiction of the District Court in this matter.

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[1] References to "A" pages are to the Appendix to this Petition.

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions, set forth in relevant part:

- ERISA § 502(a), 29 U.S.C. §§ 1132(a)(1)(B) and (a)(3)(B):

> "**Persons empowered to bring a civil action.** A civil action may be brought --
> (1) by a participant . . . --
> . . . . (B) to recover benefits due to him under the terms of his plan . . .
> . . . .
> (3) by a participant . . .
> . . . (B) to obtain other appropriate equitable relief . . . (ii) to enforce any provisions of this title or the terms of the plan . . . "

- ERISA § 3(7), 29 U.S.C. § 1002(7):

> "The term 'participant' means any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . "

- Cal. Ins. Code § 10270.65 (West 1972):

> "If hereafter any dividend is paid or any premium refunded under any policy of group disability insurance heretofore or hereafter issued, the excess, if any, of the aggregate dividends or premium refunds

under such policy over the aggregate expenditures for insurance under such policy made from funds contributed by the policyholder, or by an employer of such insured persons or by union or association to which insured persons belong, including expenditures made in connection with the administration of such policy, shall be applied by the policy holder for the benefit of such insured employees generally or their dependents or insured members generally or their dependents. For the purpose of this section and at the option of the policyholder, 'policy' may include all group life and disability insurance policies of the policyholder."

- ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A):

> "(b) **Construction and application.** . . . (2)(A) . . . nothing in this title shall be construed to exempt or relieve any person from any law of any state which regulates insurance . . ."

- The McCarron-Ferguson Act of 1945, 15 U.S.C. § 1012(b):

> "No act of Congress shall be construed to invalidate, impact, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . ."

STATEMENT OF THE CASE

Plaintiff John D. Ruocco ("Ruocco"), represents the class of current and former BEHR employees who,

between January 1, 1982, and December 31, 1984, enrolled in a group long-term disability policy issued to BEHR by Union Mutual Insurance Company. (A7) Through the policy, Union Mutual agreed to pay fixed "monthly benefits" to enrolled full-time BEHR employees who became totally disabled as a result of sickness or injury. (A5) According to the policy, Union Mutual would calculate the "monthly benefit" on the basis of the disabled employee's earnings. Premiums were paid primarily through payroll deductions by enrolled employees. BEHR itself paid all administrative expenses and, from time to time, some premiums to prevent a lapse in coverage. (A5) According to the policy, coverage automatically ceased at midnight on the date the employee's employment terminated. (A5) BEHR highlighted these and other provisions of the policy in the summary plan description distributed to the enrolled employees.

On September 24, 1986, Union Mutual notified BEHR that it intended to convert from a mutual insurance company to a wholly-owned subsidiary of a publicly owned stock corporation called UNUM. (A5) In accordance with the law of Maine, Union Mutual's state of organization, Union Mutual could not complete the conversion until it distributed to each policyholder a pro rata share of retained surplus which Union Mutual acquired while operating as a mutual insurance company. (A5) Union Mutual informed BEHR that it intended to distribute the surplus in the form of shares of UNUM stock and warrants to purchase additional shares of UNUM stock. (A6) The warrants had to be exercised between September 26 and October 28, 1986. (A6)

BEHR exercised the warrants in early October, 1986. (A6) BEHR paid $609,336.00 for the additional shares, which BEHR sold in November, 1986, for

$712,249.30. (A6) Thus, BEHR generated a profit of $104,913.30 on the warrants.

BEHR received the remaining distribution of UNUM stock in November, 1986. (A6) BEHR sold these shares in November for $524,510.01. Thus, in total, BEHR received $629,423.31 from Union Mutual's distribution of retained surplus. (A6)

In accordance with section 10270.65 of the California Insurance Code, BEHR retained the distribution to recover some of the earlier costs and contributions which BEHR itself had incurred in connection with its insurance programs.[2] For example, on its group life policy alone, between 1980 and 1986, BEHR itself paid premiums totalling $949,960.44 -- well in excess of the amount recovered from Union Mutual. (A57) Since BEHR's contributions exceeded the amount

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[2] California Insurance Code Section 10270.65 provides as follows:

"If hereafter any dividend is paid or any premium refunded under any policy of group disability insurance heretofore or hereafter issued, the excess, if any, of the aggregate dividends or premium refunds under such policy over the aggregate expenditures for insurance under such policy made from funds contributed by the policyholder, or by an employer of such insured persons or by union or association to which insured persons belong, including expenditures made in connection with the administration of such policy, shall be applied by the policy holder for the benefit of such insured employees generally or their dependents or insured members generally or their dependents. For the purpose of this section and at the option of the policyholder, 'policy' may include all group life and disability insurance policies of the policyholder."

of the distribution, section 10270.65, if not preempted, would justify BEHR'S decision.[3]

Plaintiff Ruocco was employed by BEHR until August 1986, prior to the date Union Mutual announced its plan to distribute the retained surplus. (A5) On June 29, 1987, Ruocco filed this class action alleging that BEHR's decision to retain the distribution of retained surplus constituted a breach of fiduciary duty under ERISA. (A6) After a series of motions on the pleadings and the certification of the class, the parties scheduled cross motions for summary judgment and partial summary judgment before the District Court to be heard on July 25, 1988. At the hearing, the District Court specifically found that none of the Petitioners breached any fiduciary duty under ERISA and did not act in bad faith. (A16) The District Court further found that no provision of ERISA applied to this situation and California Insurance Code section 10270. 65, even if it applied, was preempted by ERISA. On the jurisdictional issue, the District Court concluded that Union Mutual's distribution of retained surplus constituted a "hybrid benefit" under ERISA, so that the plaintiffs could be characterized as "participants" with standing to pursue their claims in District Court. The District Court further concluded that under an equitable balancing test, the plaintiffs, rather than BEHR, were entitled to the distribution, less whatever administrative costs which BEHR had incurred in connection with the group long term disability policy. Finally, *sua sponte*, the District Court awarded plaintiffs their attorneys' fees and costs. (A15-16) As a result, the District Court denied BEHR's motion for summary judgment, and granted Ruocco's motion for partial summary judgment

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[3] The Ninth Circuit agreed with this contention. (*See* A10.)

against BEHR, BEHR's President (Bolin) and Executive Vice President (Prush). The District Court acknowledged the complexity and novelty of the issues, and thus certified the matter for an immediate appeal to the Ninth Circuit.

On December 2, 1988, the Ninth Circuit accept ed the appeal. (A7) After briefing and oral argument, on May 18, 1990, the Ninth Circuit reversed the District Court's decision as to Bolin and Prush, but affirmed the decision in all other respects. (A1)

Petitioners now seek review in this Court.

REASONS FOR GRANTING THE WRIT

In *Firestone Tire & Rubber Company v. Bruch*, this Court stated that a former employee must have a colorable claim to a vested benefit before he or she may claim standing under ERISA as a plan participant. The decision of the Ninth Circuit found a "colorable claim" in the absence of an express or implied contractual provision, in spite of a California Insurance Code provision addressing the issue, and in spite of principles of common law. Petitioners respectfully request this Court to invalidate the Ninth Circuit's decision broadening the jurisdiction of the federal court in the area of insurance, which has traditionally been within the province of the states' courts and legislatures.

Acting within the scope of its authority to regulate matters of insurance, California and fourteen other states and territories have enacted statutes addressing the circumstances under which each party is entitled to recover distributions of dividends from a group insurance carrier. The Ninth Circuit declined to defer to California's authority to regulate insurance, and

invalidated the California statute under ERISA. As a result, the ability of employers across the United States to rely on such statutes to offset the costs of administering insurance policies for their employees will be significantly undercut. These employers may well choose not to provide such services at all -- a result that Congress specifically sought to avoid in framing ERISA. Petitioners respectfully request this Court to review and reverse the Ninth Circuit's decision which implicates the states' rights to regulate matters of insurance.

I. IT WAS ERROR FOR THE NINTH CIRCUIT TO EXTEND JURISDICTION UNDER ERISA TO INCLUDE A PLAINTIFF WHO HAS NO COLORABLE CLAIM TO BENEFITS UNDER THE TERMS OF HIS GROUP POLICY, CALIFORNIA LAW OR COMMON LAW.

Under limited circumstances, ERISA provides federal courts with concurrent jurisdiction over certain controversies by a participant in an employee benefit plan. 29 U.S.C. § 1132(a), (e). To bring a civil action under ERISA in federal court, a plaintiff must be a "participant" of a plan, who is seeking "to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B); *Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986) (*per curiam*), *cert. denied*, 479 U.S. 916 (1986) (District Court lacked jurisdiction over claims by former employees for breach of fiduciary duty and nondisclosure of pension plan documents because all vested benefits had already been distributed in a lump sum); *Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 655 (9th Cir. 1985) (District Court lacked jurisdiction over claims by former employees to pension benefits). Thus, ERISA

standing depends on the plaintiff's qualifying as a participant or beneficiary. *Freeman*, 721 F.2d at 655; *Nugent v. Jesuit High Sch. for New Orleans*, 625 F.2d 1285, 1287 (5th Cir. 1980).

The definition of "participant" includes either "employees in or reasonably expected to be in, currently covered employment," *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, ____, 109 S. Ct. 948, 957-58 (1989) (quoting *Saladino v. I.L.G.W.U. National Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985)), or former employees who have "'a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to *vested* benefits." *Id.* (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (emphasis added)).

ERISA does not regulate the substantive content of welfare benefit plans. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985); *see also Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 91 (1983). Although the courts are to develop a federal common law of rights and obligations under ERISA regulated plans, the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of the terms of the plan at issue. *Firestone Tire and Rubber Co.*, 109 S. Ct. at 955. Thus, in determining whether the plaintiffs have a "colorable claim to vested benefits," one should look first to the terms of the Union Mutual policy, then to any obligations imposed by California law or common law.

The Union Mutual policy itself does not provide the enrolled employees with any right to participate in distributions of retained surplus. (A5-6) On the contrary, the policy limits benefits to a fixed amount calculated on the basis of a qualifying employee's previous salary. (A5) Only total disability triggers any

right to benefits. (A5) The enrolled employees purchased insurance, not an equitable interest in Union Mutual. Under the express terms of the policy, the plaintiffs are not entitled to any benefits.

Under California law, as well, Ruocco has no colorable claim to vested benefits. California Insurance Code section 10270.65 permits an employer maintaining a group long term disability plan to recover its "costs and contributions" through any dividends issued by the insurer.[4] The statute provides that "[f]or the purpose of this section and at the option of the policyholder, 'policy' may include all group life and disability insurance policies of the policyholder." Cal. Ins. Code § 10270.65. Since the dividend distributed by Union Mutual totalled $629,423.31 and BEHR's contributions incurred in connection with its group life policy alone exceeded $900,000, Ruocco has no colorable claim to the distribution under California law.

Finally, under principles of common law, Ruocco has no colorable claim to the distribution. Under common law, the right of individual employees enrolled in a group policy to a proportionate share of retained surplus distributed by the insurer has to be premised on the policy or on a contract, express or implied, between the employer and the employees. *Pelelas v. Caterpillar Tractor Co.*, 113 F.2d 629 (7th Cir.), *cert. denied*, 311 U.S. 700 (1940) (class action by former employees, who had been enrolled in a group insurance program, alleging a right to an insurer's distribution of retained surplus to the employer, was properly dismissed because as a matter of law the employees had no right to the distribution); *Peterson v. City of Colorado Springs*, 37

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[4] In Section II, pp. 14-17, BEHR discusses the preemption issue.

Colo. App. 475, 548 P.2d 1285 (1976) (same); *Slattery v. Pullman Co.*, 38 Del. Ch. 387, 153 A.2d 575 (1959) (same); 3 Appleman, *Insurance Law and Practice*, at 283 (West 1967). Under common law, such an employee has no claim under an equitable theory of money had and received, even if the employees themselves paid portions of the premiums. *Pelelas*, 113 F.2d at 631. Under common law, such an employee has no claim under a theory of implied contract. *Peterson*, 548 P.2d 1285. Finally, under common law, such an employee has no claim to the money under a theory of unjust enrichment. *Slattery*, 153 A.2d at 576-577. The employees were told that they would receive certain coverage for certain payments, and that is all. *Id.* Under common law, Ruocco also has no colorable claim to vested benefits.

Since Ruocco has no colorable claim to vested benefits under the terms of the policy, California law, or common law, he can not be characterized as a "participant." Therefore, the District Court lacks jurisdiction.

In recent years numerous Circuit Courts have wrestled with the scope of jurisdiction under ERISA. *Compare Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986), *Joseph v. New Orleans Elec. Pension and Retirement Plan*, 754 F.2d 628 (5th Cir.), *cert. denied*, 474 U.S. 1006 (1985) *with Sladek v. Bell System Management Pension Plan*, 880 F.2d 972 (7th Cir. 1989) *and Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406 (9th Cir. 1988). Since the issue is recurring and involves the conflicting jurisdiction of the state and federal courts, BEHR respectfully requests that the Court take this opportunity to clarify the issue.

II. IT WAS ERROR FOR THE NINTH CIRCUIT TO USE ERISA TO INVALIDATE CALIFORNIA INSURANCE CODE SECTION 10270.65.

The Ninth Circuit agreed that California Insurance Code section 10270.65, if not preempted by ERISA, provides BEHR with a complete defense. (A10) With all due respect, BEHR believes the Ninth Circuit usurped the states' traditional authority to enact regulations in the area of insurance by invalidating section 10270.65, especially since preemption is disfavored in this context. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 741 (1985).

The McCarron-Ferguson Act of 1945 mandates deference to state insurance laws in no uncertain terms: "No Act of Congress shall be construed to invalidate, impart, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . ." 15 U.S.C. § 1012(b) (1982). Courts should construe state enactments liberally, if possible, to give them a construction placing them within the McCarron-Ferguson Act's exemption. *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 28 (D. Or. 1966) (holding Oregon and Washington insurance regulations within the McCarron-Ferguson Act exemption); *see also Feinstein v. Nettleship Co. of Los Angeles*, 714 F.2d 928, 930-31 (9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984).

Congress specifically confirmed the mandate of the McCarron-Ferguson Act in two provisions of ERISA. First, ERISA does not "alter, amend, modify, invalidate, impair or supersede any law of the United States." 29 U.S.C. § 1144(d). This includes the McCarron-Ferguson Act. *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502, 505 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978). Second, ERISA's preemption provision includes an insurance

savings clause which provides that "nothing in this title shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking or securities." 29 U.S.C. § 1144(b)(2)(A); *General Motors v. California Bd. of Equalization*, 815 F.2d 1305, 1310 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988) (holding certain sections of California's Revenue and Tax Code were not preempted by ERISA).

Given the presumption against preemption and the mandate of the McCarron-Ferguson Act, ERISA's savings clause must be construed broadly with due regard for the states' traditional powers in the field of insurance. *Metropolitan Life*, 471 U.S. at 739-40. If a state law "regulates insurance," as mandated benefit laws do, it is not preempted. *Id.* at 746.

In *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 48 (1987), this Court set forth a two-part test to determine whether or not a state's law "regulates insurance" and thus is saved from preemption. First, the court is to take a "common sense view" of the language of the law itself. *Id.* at 48. The law must not just have an impact on the insurance industry, but be specifically directed toward that industry. *Id.* at 50. Second, if the common sense view does not provide an adequate answer, courts may seek assistance from cases interpreting the phrase "business of insurance" in the McCarron-Ferguson Act. *Id.* at 49.

BEHR believes that the Ninth Circuit has misapplied the Court's two step test. Under a "common sense view," California Insurance Code section 10270.65 "regulates insurance." In fact, it regulates nothing else. The statute itself uses the words "policy," "group disability insurance," "policyholder," "insureds," "dependents," and "group life . . . insurance policies."

The statute does not apply to any context other than insurance. From a common sense view, section 10270.65, part of California's Insurance Code, regulates "insurance." Likewise, under the factors used to interpret the McCarron-Ferguson Act, section 10270.65 regulates the "business of insurance," since it relates exclusively to group insurance policies, which by definition spread risk among the insureds', and is an integral part of the policy relationship. *See Pilot Life*, *supra*, 481 U.S. at 49. Thus, BEHR contends that the Ninth Circuit reached an improper conclusion even from the test in its current form.

California Insurance Code section 10270.65 and the comparable laws enacted by the fourteen other states and territories[5] provide the Court with the opportunity to refine further the preemption test, an opportunity which BEHR requests the Court accept in view of the importance and recurring nature of the issue. BEHR understands that the interpretation of the phrase "business of insurance" under the McCarron-Ferguson Act assists in the application of ERISA's preemption provision. However, in ERISA's savings clause, Congress used the phrase: "regulating insurance" -- not "regulating the business of insurance" (as in the McCarron-Ferguson Act) and not "regulating insurance businesses." The language in ERISA manifests an intent to save from preemption a broader range of laws than does the McCarron-Ferguson Act. Given the number of preemption cases arising in the Circuit Courts, the presumption against preemption and the importance of delineating the authority of the states and Congress in this area, BEHR respectfully requests the Court to grant

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[5] A list of the analogous state and territorial statutes is provided at A29-30.

certiorari and clarify the scope of the savings clause of ERISA's preemption provision.

III. IT WAS ERROR TO AWARD ATTORNEYS' FEES TO PLAINTIFFS WHEN THE ISSUE WAS NEITHER RAISED NOR BRIEFED, NO FINAL JUDGMENT HAS BEEN ENTERED, AND THE DISTRICT COURT SPECIFICALLY FOUND NO BREACH OF FIDUCIARY DUTY UNDER ERISA AND NO BAD FAITH.

Under ERISA a court has the discretion to award attorneys' fees and costs of an action by a plan participant to either party. 29 U.S.C. § 1132(g) (1982); *Hummell v. S. E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980). However, before awarding or denying attorneys' fees, the court must consider several factors including (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting in similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and solve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. *Hummell*, 634 F.2d at 453.

An award of attorneys' fees in this action should be inappropriate as a matter of law. While the *Hummell* factors are not exclusive, they provide the general parameters for the court's inquiry. *See Hummell*, 634 F.2d at 453; *Carpenters Southern Cal. Admin. Corp. v. Russell*, 726 F.2d 1410, 1415 (9th Cir. 1984). The factors themselves demonstrate that an award of attorneys' fees is intended either to punish or deter bad faith actions by plan administrators, or to reward and encourage actions that realize a substantial benefit to

the plan as a whole or solve a significant legal issue regarding ERISA. *See Hummell,* at 453.

In view of the District Court's findings of no breach of fiduciary duty and no bad faith, and in the absence of a final judgment, BEHR requests that the Court review this issue as well and reverse the decision of the Ninth Circuit.

CONCLUSION

This case involves issues of national importance regarding the interpretation of ERISA's definitions of "participant" and "benefit," the scope of ERISA's jurisdiction, the conflicting authority of state and federal courts, the authority of the states and Congress to regulate the area of insurance, and the scope of ERISA's preemption clause. Because Petitioners believe the Ninth Circuit has improperly expanded the scope of ERISA, thereby diminishing the authority traditionally belonging to the states, Petitioners respectfully request

the Court to grant this Petition and issue a Writ of Certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

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August 16, 1990

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN D. RUOCCO, on behalf of himself and as the representative of a class of persons similarly situated,

Plaintiff-Appellee,

v.

BATEMAN EICHLER, HILL, RICHARDS, INCORPORATED, JOHN R. BOLIN, THEODORE PRUSH,

Defendants-Appellants.

No. 88-6655

D.C. No. CV-87-04173-DT

OPINION

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted
March 6, 1990—Pasadena, California

Filed May 18, 1990

Before: David R. Thompson and Stephen S. Trott, Circuit Judges, and Malcolm F. Marsh, District Judge.*

Opinion by Judge Marsh

*Honorable Malcolm F. Marsh, United States District Judge for the District of Oregon, sitting by designation.

SUMMARY

ERISA/Jurisdiction

The court of appeals affirmed in part and reversed in part a district court judgment, holding that under ERISA an employer was obligated to return to disability plan participants a surplus dividend received from the insurance carrier.

Appellant Bateman, Eichler, Hill, Richards, Inc. (BEHR) offered its employees, including appellee John Ruocco, disability insurance through Union Mutual Insurance Co. BEHR paid the premiums through employee pay deductions and also paid the administrative costs. Union Mutual converted from a mutual insurance company to a wholly-owned subsidiary of another corporation. Union Mutual distributed to its policyholders pro rata shares of the retained surplus in the form of stock and warrants for purchase of additional stock. BEHR exercised the warrants and then realized profits from the sale of both the distributed and the purchased stock. BEHR retained the profits. Ruocco filed an action in district court, claiming violations of ERISA, state law, and RICO. The district court found that the plan was covered by ERISA, that the defendants were fiduciaries, that Ruocco was a participant in the plan, and that the surplus was an asset of the plan. The court granted partial summary judgment on the non-RICO claims and also awarded attorney's fees.

[1] As a former plan participant who contributed financially to the plan, Ruocco had a colorable claim of entitlement to the surplus dividend distribution.

[2] The defendants were correct in asserting that the distribution of the surplus was a dividend under a state statute (Cal. Civ. Code § 10270.65) and that costs could be aggregated. However, that statute is preempted under ERISA because it relates to an employee benefit plan (29 U.S.C.

§ 1144(a)). [3] The "savings clause" of 29 U.S.C. § 1144(b)(2)(A) provides that state laws regulating insurance are not ERISA-preempted. [4] However, in this case, the state statute does not regulate insurance because: 1) it does not transfer or spread the policyholder's risk but deals merely with administration of certain policy surplus, and 2) it is not an integral part of the policy relationship between the insurer and the insured but rather deals with the relationship between the policyholder and the insured.

[5] The premium surplus may have been *held* as an asset by Union Mutual, but it was part of the interest of the mutually insured in the company and was therefore not an asset of the insurer under 29 U.S.C. § 1101(b)(2). Further, [6] a balancing of equities weighed in favor of transferring the surplus to the participants, since they paid the premiums and BEHR paid nothing, outside of minor administrative costs.

[7] BEHR was neither creator nor settlor of a "trust," because it did not pay premium costs, and [8] its contentions that it risked its own money by exercising the warrants and could not have provided the participants with notice was speculative.

[9] Regarding attorney's fees, the record indicates that the district court gave the defendants an opportunity to address the issue and that the court's order was supported by findings that the defendants had the ability to pay, that an award would deter others from acting in such a fashion, that Ruocco was seeking to benefit all participants in the BEHR plan and to resolve significant legal questions concerning ERISA, and that Ruocco's position was substantiated on both legal and equitable grounds.

COUNSEL

Craig B. Jorgensen, Jon L. Rewinski, Louis W. Karlin, Kindel & Anderson, Los Angeles, California, for the defendants-appellants.

J. Michael Hennigan, Richard M. Callahan, Jr., Hennigan & Mercer, Los Angeles, California, for the plaintiff-appellee.

OPINION

MARSH, District Judge:

This action involves claims by John Ruocco, on behalf of himself and current and former Bateman, Eichler, Hill, Richards, Inc., et al., ("BEHR") employees who participated in BEHR's long-term disability plan between January 1, 1982 and December 30, 1984. The plaintiff class claims that BEHR violated its fiduciary duties, the Employment Retirement Income and Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461 (1982 & Supp. V 1987), section 8315 of the California Commercial Code, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1982 & Supp. V 1987), when it failed to distribute to the plan participants a surplus dividend received from BEHR's disability insurance carrier. BEHR appeals the district court's grant of partial summary judgment to Ruocco on the non-RICO causes of action awarding to Ruocco $629,423.31 minus administrative costs, and attorney's fees. We affirm the district court's decision with respect to defendant BEHR but reverse the decision holding defendants Bolin and Prush personally liable.

I.

BEHR is a stock brokerage and financial consulting firm with its principal place of business in Los Angeles, California. At all relevant times, John R. Bolin was BEHR's president, chief executive officer and chairman of the board of directors. Theodore W. Prush was BEHR's executive vice president, chief financial officer and a member of the board of directors.

From 1968 to 1986, BEHR offered its employees group long term disability insurance through Union Mutual Insurance Company ("Union Mutual"). The Union Mutual policy was paid for by the employees participating in the plan. BEHR deducted premiums from the pay of participating employees and transmitted these premiums to Union Mutual. While BEHR paid premiums itself from time to time in order to prevent a lapse in coverage, the amount of premiums paid by BEHR was minimal. BEHR paid all administrative costs for the plan. Ruocco, an employee of BEHR until August 1986, elected the long term disability coverage provided by Union Mutual.

The Union Mutual policy provided:

> When proof is received that an insured employee is totally disabled as a result of sickness or injury and requires the regular attendance of a legally qualified physician, the Insurance Company will pay a monthly benefit to the insured employee after completion of the elimination period.

The policy defined "employee" as "a full-time employee, individual, proprietor, or partner who is regularly working at least 30 hours per week during the regular work week of the employer." The policy also provided that

> [a]ll insurance provided under this Policy for an insured employee will cease at 12:00 midnight on the earliest of the following occurrences: . . . (2) On the date that the insured employee ceases to be in a class of employees eligible for insurance.

On September 24, 1986, Union Mutual notified BEHR that it intended to convert from a mutual insurance company to a wholly-owned subsidiary of a publicly-owned stock corporation called UNUM. Under Maine law, where Union Mutual was incorporated, such conversion could take place

only upon distribution to each policyholder of a pro rata share of the retained surplus which the converting company had acquired while it was operating as a mutual company. Union Mutual determined the BEHR surplus by considering the premiums paid between January 1, 1982 and December 31, 1984. Union Mutual notified BEHR that the returned surplus would take the form of shares of UNUM stock and warrants to purchase additional shares of UNUM stock. The warrants had to be exercised between September 26 and October 28, 1986.

In October 1986, the Executive Committee of BEHR decided to exercise the warrants and paid $609,336 to buy 25,755 shares of UNUM stock. These shares were sold by BEHR in November 1986 for $712,249.30 thereby generating a profit of $104,913.30. In November 1986, BEHR also received the straight distribution of UNUM shares which BEHR sold on November 6, 1988 for $524,510.01. In total, BEHR received $629,423.31 from the profit on the sale of shares purchased on the warrants and the sale of the distributed shares.

On June 29, 1987, Ruocco filed this action, claiming that BEHR's decision to retain the UNUM distribution violated ERISA, California Commercial Code section 8315, and various provisions of RICO. The district court dismissed the RICO claims, but granted summary judgment to Ruocco on both the ERISA and California Commercial Code section 8315 claims. The court found that the BEHR long term disability plan was an "employee welfare benefit plan" as defined by ERISA, 29 U.S.C. § 1002(1), that defendants were "fiduciaries" of the Plan, that Ruocco was a "participant" in the plan, and that the surplus dividend constituted an "asset of the plan" pursuant to 29 U.S.C. section 1101. While the court found that defendants did not breach their fiduciary duty to the plaintiff class, the court held that defendants' decision to keep the UNUM distribution was "arbitrary and capricious." The court found that the balance of equities

weighed in favor of the plan participants because "the premiums for the plan were paid for by the participants" and because "the funds would not inure to the benefit of the participants of the plan" if distributed to the defendants. The district court also found that the sale of the UNUM stock constituted a wrongful transfer of securities, in violation of California Commercial Code section 8315. Finally, the court ruled that plaintiffs were entitled to attorney's fees under ERISA pursuant to 29 U.S.C. section 1132(g)(1).

On September 6, 1988, BEHR petitioned this court for permission to pursue an immediate interlocutory appeal. The court granted this petition on December 2, 1988.

II.

A grant of summary judgement is reviewed de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989); *State Farm Fire & Casualty Co. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989). The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material facts and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989); *Judie v. Hamilton*, 872 F.2d 919, 920 (9th Cir. 1989).

Issues dealing with the interpretation and application of ERISA provisions as well as preemption under ERISA are also subject to de novo review. *Admiral Packing Co. v. Robert F. Kennedy Farm Workers Medical Plan*, 874 F.2d 683, 684 (9th Cir. 1989); *Chase v. Trustees of W. Conf. of Teamsters Pension Trust Fund*, 753 F.2d 744, 746 (9th Cir. 1985); *Trustees of Amalg. Ins. Fund v. Geltman Indus. Inc.*, 784 F.2d 926, 929 (9th Cir.), *cert. denied*, 479 U.S. 822 (1986).

III.

BEHR asserts error on nine grounds.

1. *Lack of Jurisdiction*

BEHR argues that the district court erred because it lacked jurisdiction over plaintiff's ERISA claim. BEHR argues that Ruocco was not a "participant" of a welfare benefit plan as defined by ERISA because Ruocco received all the benefits he was entitled to under the disability benefit plan and was no longer employed by BEHR at the time the Union Mutual surplus was distributed.

ERISA defines participant as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7). The Supreme Court has interpreted ERISA's definition of participant as including both "employees in or reasonably expected to be in, currently covered employment," *Firestone Tire & Rubber Co. v. Bruch*, 109 S.Ct. 948, 957-58 (1989) (quoting *Saladino v. ILGWU Nat'l Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985)), or "former employees who 'have a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Firestone*, 109 S.Ct at 957-58 (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.), *cert. denied*, 479 U.S. 916 (1986)).

[1] Applying the *Firestone* test to this case, we find that Ruocco presents "a colorable claim" of entitlement to the Union Mutual surplus based on his status as a former plan participant who contributed financially to the plan. This claim to entitlement is not altered by Ruocco's termination of employment with BEHR.

2. *California Insurance Code Section 10270.65*

BEHR argues that the district court erred because under California Insurance Code section 10270.65, BEHR was entitled to retain the Union Mutual surplus.

Section 10270.65 provides:

> If hereafter any dividend is paid or any premium refunded under any policy of group disability insurance heretofore or hereafter issued, the excess, if any, of the aggregate dividends or premium refunds under such policy over the aggregate expenditures for insurance under such policy made from funds contributed by the policyholder, or by an employer of such insured persons or by union or association to which insured persons belong, including expenditures made in connection with the administration of such policy, shall be applied by the policyholder for the benefit of such insured employees generally or their dependents or insured members generally or their dependents. For the purpose of this section and at the option of the policyholder, "policy" may include all group life and disability insurance policies of the policy holder.

Cal. Ins. Code § 10270.65 (West 1972).

The district court made three findings on this issue: first, that the code is not applicable to the facts of this case "since the UNUM distribution was neither a 'premium refund' nor 'dividend' as contemplated by the statute;" second, that because section 10270.65 "does not contemplate the offsetting of employer costs from all benefit plans before providing the surplus to the participants of the plan," BEHR could only recoup administrative costs incurred in connection with the BEHR long term disability plan; and third, that section 10270.65 is "preempted by ERISA, as it clearly 'relates to' an employee welfare benefit plan, as codified in 29 U.S.C. § 1144(a)[1]."

[1] 29 U.S.C. § 1144(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

BEHR argues that the district court erred in its first holding because the Union Mutual distribution does constitute a "dividend" within the meaning of section 10270.65. BEHR argues that the court erred in its second holding because section 10270.65 allows a policyholder to aggregate the costs incurred in connection with its group life policy. With respect to the third holding, BEHR argues that there is no ERISA preemption because section 10270.65 deals with the regulation of insurance and therefore is covered by the insurance "saving clause" contained in section 1144(b)(2)(A).

[2] While defendants are correct that the distribution of the surplus constitutes a dividend under section 10270.65 on which costs can be aggregated, *see Luksich v. Kaser Steel Corp.*, 245 Cal. App. 2d 373, 374-75, 53 Cal. Rptr. 875 (1966), we find that section 10270.65 is preempted under ERISA because it relates to an employee benefit plan within the meaning of 29 U.S.C. section 1144(a).

[3] The "savings clause" of § 1144(b)(2)(A) provides that "nothing in this title shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities." In determining whether a state's law regulates insurance and therefore is not preempted under section 1144(a), the Supreme Court set forth the following two-part test in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987):

> In *Metropolitan Life*, we were guided by several considerations in determining whether a state law falls under the saving clause. First, we took what guidance was available from a 'common-sense view' of the language of the saving clause itself. 471 U.S., at 740. Second, we made use of the case law interpreting the phrase 'business of insurance' under the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, in interpreting the saving clause.

481 U.S. at 48. *See also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). With respect to the second-part of this test, the Court set forth the following three criteria for determining whether a practice falls under the 'business of insurance' for purposes of the McCarran-Ferguson Act[2]:

> '*[F]irst*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.'

Pilot Life, 481 U.S. at 48-49 (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982))(emphasis in original).

[4] California Insurance Code section 10270.65 does not regulate insurance within the meaning of either the McCarran-Ferguson Act or ERISA, 29 U.S.C. § 1144(b)(2)(A). This statute fails the first part of the *Metropolitan* test because it does not transfer or spread the policyholder's risk but rather deals merely with the administration of certain policy surplus. The statute fails the second part of the test because it is not an "integral part of the policy relationship" between the insurer and the insured but rather deals with the relationship between the policyholder and the insured. While section 10270.65 is limited to entities within the insurance industry, this alone does not support a finding of insurance regulation within the meaning of section 1144(b)(2)(A). The "saving clause" to ERISA exempts from preemption state regulation of insurance companies and terms of insurance contracts not state regulation of employee

[2]The McCarran-Ferguson Act of 1945 provides that "[n]o act of Congress shall be construed to invalidate, impart, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . ." 15 U.S.C. § 1012(b) (1982).

benefit plans funded by the insurance industry.[3] The same conclusion is reached under a "common sense view" of section 10270.65.

3. *Asset of the Insurer*

BEHR claims the retained surplus of a group disability carrier is not an asset of a covered plan pursuant to 29 U.S.C. section 1101 and therefore ERISA does not require BEHR to distribute the Union Mutual surplus to participating employees. Section 1101(b)(2) provides that "[i]n the case of a plan to which a guaranteed benefit policy is issued by an insurer, the assets of such plan shall be deemed to include such policy, but shall not, solely by issuance of such policy, be deemed to include any assets of the insurer."

[5] While the premium surplus may have been held as an asset by Union Mutual, this asset was not owned by the insurance company but was part of the interest of the mutually insured in the company. *See* 18 J. Appleman, Insurance Law and Practice § 10059 (1945). As stated, Union Mutual was required to distribute this retained surplus to policyholders prior to its conversion from a mutual insurance company to a wholly-owned subsidiary of a publicly-owned stock corporation. The surplus, therefore, did not constitute an asset of the insurer within the meaning of 29 U.S.C. section 1101(b)(2).

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[3]In reaching this conclusion, we also draw support from the fact that "the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life*, 481 U.S. at 45-46 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)); *see also Board of Trustees v. H.F. Johnson, Inc.*, 830 F.2d 1009, 1016 (9th Cir. 1987)("ERISA preemption is to be construed broadly").

4. *Unexpected and Undeserved Windfall*

BEHR contends that the district court erred in awarding the Union Mutual surplus to former employees because the award constitutes an unexpected and undeserved windfall for the employees. In determining who was entitled to the surplus, the district court relied heavily on the Third Circuit's decision in *Chait v. Bernstein*, 835 F.2d 1017 (3d Cir. 1987). In *Chait*, the court held that an employer could amend an ERISA plan to allow surplus assets to revert to the employer despite the plan's prohibition on amendments to the plan to allow the funds to be used for purposes other than for the exclusive benefit of the employees. The court held that the plan could be so amended because the plan contained no additional language limiting the reversion beyond the "exclusive benefit" provision and because the equities of the case favored the employer's creditors rather than the vested employees. *Id.* at 1027. In reaching this conclusion, the court emphasized the fact that the plan was a "defined benefit plan to which the employees never contributed." On this matter, the court held:

> In the context of a defined-benefit plan to which the employer was the sole contributor that does not contain explicit prohibitory language, we see no congressional policy that would prevent allowing the employer to amend the plan to receive excess assets after paying out all the benefits.

Id. See also Wright v. Nimmons, 641 F.Supp. 1391, 1406-07 (S.D. Tex. 1986) (noting that where a trust plan is silent as to the distribution of assets, if the employer has "exclusively funded a plan," the "unbargained for distribution of excess assets to participants represents an unintended windfall for employees").

[6] In this case, the district court found that the balancing of equities weighed in favor of the plan participants because

the premiums for the plan were paid for by the participants and because "[o]utside of minor administrative costs, BEHR paid nothing." The court also found that if the surplus were distributed to the defendants, the fund would not inure to the benefit of the plan participants, but rather "as a result of BEHR's incentive bonus plan, would fall in large part into the hands of BEHR's Executive Committee which had voted to keep the distribution." We agree with the district court that the balance of equities weighs in favor of the plaintiff class.

5. *Resulting Trust*

[7] Next BEHR argues that it is entitled to retain the Union Mutual surplus under the law of trust because BEHR was the creator or settlor of the plan trust. BEHR argues that, as a result of its status as settlor of the trust, when surplus assets remained in the long term disability fund after the trust's purpose had been fulfilled, a resulting trust arose for its benefit. We reject BEHR's argument. BEHR did not pay the premium costs to fund the plan and therefore was neither a 'creator' nor 'settlor' of the trust. *See, e.g., Lehman v. Commissioner of Internal Revenue*, 109 F.2d 99, 100 (2d Cir.), *cert. denied*, 310 U.S. 637 (1940) (defining settlor as one who furnishes the consideration for a trust).

6. *Financial Risk*

[8] BEHR argues that the district court erred in ordering BEHR to pay its former employees the profits which it earned by exercising the UNUM warrants because BEHR risked its own money in exercising the warrants and could not have provided its former employees with sufficient notice to exercise these warrants given the large number of employees involved. BEHR's argument as to what would have happened had it given the plan participants notice is speculative and does not support a finding that BEHR is entitled to retain the surplus. Nor does the fact that BEHR used its own money to

exercise the warrants justify BEHR's retention of the acquired profit.

7. *California Commercial Code Section 8315*

BEHR argues that the district court erred in finding that the sale of the UNUM stock by defendants constituted a wrongful transfer of securities in violation of California Commercial Code section 8315 which prohibits the wrongful transfer of securities.[4] We disagree. The district court correctly found that section 8315 is a state statute regulating securities and therefore is saved from ERISA preemption under 29 U.S.C. section 1144(b)(2)(A). Contrary to BEHR's contention, we find no inconsistency between the district court's finding that California Insurance Code section 10270.65 is preempted by ERISA because it does *not* regulate insurance and the court's finding that California Commercial Code section 8315 is not preempted because it *does* regulate securities.

8. *Attorney's Fees*

[9] BEHR argues that the district court erred in awarding attorney fees *sua sponte* because it did not discuss the factors set forth in *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980) and did not give the parties an adequate opportunity to address this matter. We disagree. The district

[4]Section 8-315(1) of the California Commercial Code states in pertinent part:

> Any person against whom the transfer of a security is wrongful for any reason, . . . as against any purchaser except a bona fide purchaser, may do any of the following:
>
> (a) Reclaim possession of any new certificated security wrongfully transferred.
>
> (b) Obtain possession of any new certificated security representing all or part of the same rights . . .
>
> (d) Have damages.

court provided BEHR with an opportunity to address the matter when it received BEHR's opposition to the proposed statement of undisputed facts. The district court also considered the *Hummell* factors in determining that an award of attorney's fees was reasonable and appropriate. In *Hummell,* the court held that the following five factors must be considered in determining whether to award attorney's fees under 29 U.S.C. section 1132(g):

> (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting in similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and solve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Hummell, 634 F.2d at 453. The district court in this case applied the *Hummell* test and found that defendants had the ability to satisfy an award of attorney's fees, that the awarding of fees will deter others from acting in an arbitrary and capricious manner, that Ruocco was seeking to benefit all participants of the BEHR Plan and to resolve significant legal questions concerning ERISA, and that Ruocco's position in this litigation was substantiated on both legal and equitable grounds.

9. *Personal Liability of Bolin and Prush*

While the district court did not err in awarding the Union Mutual surplus and attorney's fees to the plaintiff class, the district court did err in its finding that defendants Bolin and Prush were personally liable in light of its additional finding that neither defendant breached his fiduciary duty or otherwise acted in bad faith. While Bolin and Prush may have benefited by their decision to retain the UNUM surplus under

BEHR's bonus incentive program for top executives, there is no evidence that Bolin or Prush did anything personally or that the decision to retain the UNUM surplus was not a corporate act. Likewise, while Bolin and Prush were members of the Executive Committee, the decisionmaking body of BEHR, there is no evidence that they controlled this Committee.

CONCLUSION

We affirm the judgment of the district court awarding the plaintiff class $629,423.31 minus administrative costs, and attorney's fees against defendant BEHR. We reverse the court's decision holding defendants Bolin and Prush personally liable. Plaintiff shall recover from defendant BEHR 80 percent of his costs on appeal.

AFFIRMED IN PART, REVERSED IN PART.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOHN D. RUOCCO, et al. Plaintiff, vs. BATEMAN EICHLER, HILL RICHARDS, INCORPORATED, et al. Defendants.	CASE NO.: 87-04173 DT (Kx) CLASS ACTION STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

Pursuant to the Court's order granting Plaintiff's Motion for Summary Judgment, Plaintiff John Ruocco hereby lodges his Revised Proposed Statement of Uncontroverted Facts and Conclusions of Law.
Dated: August 16, 1988

J. Michael Hennigan
Richard M. Callahan, Jr.
HENNIGAN & MERCER

By /s/ CALLAHAN
Richard M. Callahan, Jr.
Attorneys for Plaintiff

STATEMENT OF UNCONTROVERTED FACTS

1. Defendant Bateman Eichler, Hill Richards, Incorporated ("BEHR") is a stock brokerage and financial consulting firm with its principal place of business located in Los Angeles. In addition, BEHR acts as intermediary for its employees on a number of insurance plans.

2. The BEHR Long Term Disability Plan ("BEHR LTD Plan") provided BEHR employees with the opportunity to voluntarily purchase long-term disability insurance through Unionmutual Stock Life Insurance Company ("Unionmutual"). The premiums on this policy were paid by the employees participating in the plan, although BEHR would periodically pay a small amount of the premiums when necessary to keep the policy in effect. BEHR would collect the employee premiums through regular payroll deductions, and then forward the gross amount of these deducted premiums to Unionmutual. As the agent and fiduciary of the employees, BEHR had the obligation to notify the employees of any material information regarding the Plan and the policy. BEHR was deemed the "policyholder" of the Unionmutual Policy, and the participating employees were the "insureds."

3. Barbara Henderson served as Vice President of BEHR and Manager of BEHR's Human

Resources Department until April of 1987. Part of her function was to coordinate the administration for all employee insurance plans. In January of 1985, Henderson received a letter from Unionmutual which had been sent to its "policyholders," including BEHR, announcing that on December 31, 1984, Unionmutual's parent company, Union Mutual Life Insurance Company, had filed a Plan of Recapitalization and Conversion with the Superintendent of the Bureau of Insurance of the State of Maine. Under this Recapitalization, Union Mutual was to convert from a mutual insurance company to a wholly owned subsidiary of a publicly owned capital stock corporation, UNUM Corporation. An amount equal to Unionmutual's entire surplus, eventually amounting to over $652 million, was going to be allocated in the form of cash or stock among eligible policyholders according to a formula that measured each member's contribution to that surplus. Eligible policyholders were also to be given the right to subscribe to a specified number of shares of capital stock in the holding company that was being formed as part of the conversion process.

4. In late September of 1986, Henderson received notification from UNUM that under the Plan, over $530,000 worth of UNUM stock would be delivered to BEHR as a result of policyholder BEHR employees' past contributions to the UNUM surplus. In addition, this notice contained an order form concerning the right of the policyholder to purchase over 20,000 additional shares of UNUM stock in a subscription offering, to be conducted from September 26 to October 28, 1986. (Hereinafter, the distribution of stock and subscription rights will be collectively called the "UNUM distribution".)

5. Henderson then met with in-house legal counsel, and both were concerned that they would be unable to locate and notify all eligible former employees of their rights in the subscription offering within the brief period allotted for exercise of the UNUM subscription option. Henderson immediately began to set up procedures necessary to identify the eligible present and past employees and determine the extent of their interests in the shares and subscription rights.

6. Several days later, Henderson informed Theodore W. Prush, Executive Vice President and Chief Financial Officer of BEHR, of the upcoming UNUM stock distribution and subscription offering, and told him that she had begun the steps necessary to identify the eligible present and past employees who had been insured under the BEHR LTD Policy. Prush told Henderson that he and John Bolin, the Chief Executive Office of BEHR, were aware of the UNUM situation, and that Henderson should "do nothing" until she heard from him.

7. In mid-October of 1986, BEHR held its weekly meeting of the Executive Committee. This committee, comprised of defendants Bolin, Prush, as well as other BEHR division heads, was the policy-making committee of BEHR, and held the majority of the powers of the Board of Directors. At this meeting, the Executive Committee decided that BEHR, rather than the participating employees, would keep the stock. In addition, a decision was also made to take advantage of the UNUM subscription offering.

8. Within a few days, Prush told Henderson that the firm had decided to keep the UNUM stock. He indicated that the amounts of the projected distributions to insured employees didn't warrant the effort associated with making such distributions, and that she should

discontinue any efforts related to identifying present and past employees who participated in the BEHR LTD Plan.

9. On October 23, 1986, BEHR executed the forms necessary to exercise the subscription rights for its own account. BEHR then issued a check to UNUM in the amount of $609,336.00 in order to purchase the additional shares.

10. On or about November 6, 1986, BEHR trading personnel sold the total number of UNUM shares that would shortly be delivered to BEHR as a result of the UNUM stock distribution and their exercise of subscription rights. The $665,423.31 in proceeds was deposited into BEHR's general cash balance.

11. During the week of November 14, 1986, Henderson 20 received by mail a certificate for 44,726 shares of UNUM 21 Corporation stock, issued in the name of BEHR. This certificate not only included those shares issued in connection with the distribution of surplus from the employee-funded LTD policy, but also those shares received by BEHR's exercise of the subscription rights.

12. The ultimate decision to convert the stock has [sic] made by the Executive Committee of BEHR. BEHR's sale of the UNUM shares generated approximately $1.2 million in proceeds. BEHR, a plan fiduciary, realized a net profit of $629,423.31 from the sale of the UNUM stock. Under BEHR's incentive bonus plan for top executives, which was based upon a percentage of BEHR's pretax earnings, the decision by the defendants to convert these proceeds for BEHR's benefit allowed defendants Bolin and Prush, as well as the other members of the Executive Committee who

participated in the decision making process, to enhance their yearly bonuses for 1986 by thousands of dollars. Thus, a significant portion of the proceeds obtained by BEHR's misappropriation of the UNUM stock distribution and subscription offering went directly into the pockets of defendants Bolin, Prush, and the remaining members of the Executive Committee, and any amounts remaining were retained by BEHR.

CONCLUSIONS OF LAW

1. The BEHR Long Term Disability Plan is an "employee welfare benefit plan" as contemplated by ERISA, 29 U.S.C. § 1002(1).

2. Bateman Eichler, Hill Richards, Inc., John R. Bolin, and Theodore W. Prush were "fiduciaries" of the BEHR LTD Plan between 1982-1984, in accord with 29 U.S.C. § 1002(21)(A).

3. Plaintiff John Ruocco was a "Participant" in the BEHR LTD Plan at the time of filing of this lawsuit, since, under the rationale of Bricklayers Health & Wel. v. Brick Masons' Health, 656 F.2d 1387, 1391 (9th Cir. 1981), he was a former BEHR employee entitled to receive a benefit "of any type" under the plan, to wit, the distribution of surplus and subscription rights from the UNUM Plan of Reorganization and Stock Conversion. 29 U.S.C. §1002(7).

4. Section 10270.65 of the California Insurance Code is not applicable to the facts of this case, since the UNUM distribution was neither a "premium refund" nor "dividend" as contemplated by the statute. Furthermore, Section 10270.65 does not contemplate the offsetting of employer costs from all

benefit plans before providing the surplus to the participants of the plan. As such, BEHR can only recoup administrative costs incurred by the BEHR LTD plan.

5. Furthermore, Section 10270.65 of the California Insurance Code is preempted by ERISA, as it clearly "relates to" an employee welfare benefit plan, as codified in 29 U.S.C. § 1144(a).

6. The statute is not saved from preemption by the "savings clause," since that provision saves from preemption only those statutes which specifically relate to the business of insurance. Metropolitan Life Insurance Co. v. Mass., 471 U.S. 724, 740 (1985). It is restricted to state laws "regulating insurance companies and insurance contracts." United Food and Commercial Workers v. Pacyga, 801 F.2d 1157, 1159 (9th Cir. 1986); Moore v. Provident Life and Accident Ins. Co., 786 F.2d 922, 926 (9th Cir. 1986). In analyzing the savings clause, the Court must examine the three factors set forth in the McCarran-Ferguson Act to determine whether this particular state statute regulates the "business of insurance." First, whether the practice has the effect of spreading the policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. Section 10270.65 of the California Insurance Code merely regulates the conduct of the policyholders in its handling of plan assets. It has no effect of spreading any "risk," nor does it define the terms of any relationship between the insurer and the insured. The savings clause does not exempt from preemption state regulations relating to the administration of employee benefit plans, such as contained in Insurance Code Section 10270.65.

7. The UNUM distribution constitutes an "asset of the plan" pursuant to 29 U.S.C. Section 1101. The UNUM distribution does not constitute "assets of the insurer" as contemplated by 29 U.S.C. Section 1101, since this provision was merely intended to prevent insurance companies from becoming fiduciaries to every plan for which it holds assets. See Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Insurance Co., 698 F.2d 320, 327 (7th Cir. 1982).

8. Since disputes between employers and employees often arise over the distribution of surplus plan assets, the Court find [sic] the defendants have not breached their fiduciary duty to the plaintiff class. Instead, the Court adopts the reasoning of Chait v. Bernstein, 835 F.2d 1017 (3d Cir. 1988), and analyzes the "equities and policy questions presented" in determining which party is more entitled to the UNUM distribution. Id. at 1026.

The balancing of equities in this case weigh [sic] in favor of the plan participants. First, the premiums for the plan were paid for by the participants. Outside of minor administrative costs, BEHR paid nothing. This is an extremely significant factor in the balancing of equities. See Chait, 835 F.2d at 1027. C.f. 29 U.S.C. § 1344(d)(3)A) (authorizing surplus assets from terminated pension plan to revert to participants who made contributions); 29 C.F.R. § 2618.31 (same).

Furthermore, if the distribution were to go to the defendants, the funds would not inure to the benefit of the participants of the plan, but rather as a result of BEHR's incentive bonus plan, would fall in large part into the hands of BEHR's Executive Committee which had voted to keep the distribution.

9. Contrary to defendant BEHR's assertion, BEHR is not entitled to the UNUM distribution under the law of trusts. Since BEHR did not pay the premium costs to fund the program, they are neither "creator" nor "settlor" of any trust which would entitle them to such an extraordinary distribution under a "resulting trust" theory. At best, BEHR acted as "trustee" of the plan.

10. The "Arbitrary and capricious standard advocated by defendants is inapplicable to the current situation since that standard applies only to decisions by the plan administrator regarding questions of eligibility. See, e.g., Fielding v. Int'l Harvester, 815 F.2d 1254, 1256 (9th Cir. 1987). While not in bad faith, the decision of the defendants in deciding to keep the UNUM distribution was "arbitrary and capricious."

11. The sale of the UNUM stock by the defendants constituted a wrongful transfer of securities, in violation of California Commercial Code Section 8315. Contrary to defendants' arguments, Section 8315 is not preempted by ERISA since it does not "relate to" an employee welfare benefit plan, as required by 29 U.S.C. Section 1144(a). Further, such a statute is not "saved" by preemption by the saving clause, since Section 8315 is a state statute regulating securities. 29 U.S.C. 1144(b).

12. The plaintiffs are entitled to attorney's fees in this case, pursuant to 29 U.S.C. Section 1132(g)(1). The defendants have the ability to satisfy the awarding of attorney's fees in this litigation, and the awarding of fees will hopefully deter other individuals and entities faced with a similar situation from acting in such an arbitrary and capricious manner. It is further noted that the plaintiff John Ruocco was seeking to benefit all

participants of the BEHR LTD Plan, and also sought to resolve significant legal questions concerning ERISA, specifically involving the distribution of surplus assets, and the parameters of federal preemption. The plaintiff's position in this litigation was substantiated on both legal and equitable grounds, while the Court finds that the defendants acted arbitrarily and capriciously. For all of these reasons, the Court finds that the awarding of attorney's fees in this case to plaintiff is appropriate and reasonable. See Sokol v. Bernstein, 812 F.2d 559, 560 (9th Cir. 1987); Himmell v. S. E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980).

AUGUST 25, 1988

/S/ DICKRAN TEVRIZIAN
UNITED STATES DISTRICT JUDGE

Submitted by:

/S/ RICHARD CALLAHAN
HENNIGAN & MERCER
Richard M. Callahan, Jr.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am a Citizen of the United States, over the age of 18 years, employed in the County of Los Angeles in the office of a member of the bar of this court, at whose direction such service was made. I am not a party to the within action. My business address is 611 West Sixth Street, 28th Floor, Los Angeles, California.

On August 16, 1988, I caused the foregoing document described as [REVISED] (PROPOSED] STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW to be served on interested parties in this action by placing a true and correct copy in a sealed envelope addressed as follows:

Craig Jorgensen, Esq.
Jon Rewinski, Esq.
KINDEL & ANDERSON
555 S. Flower, 29th Floor
Los Angeles, CA 90071

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, CA.

Executed on August 16, 1988, at Los Angeles, CA.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ OLIVETTE SASSER

Olivette Sasser

The following states have insurance code provisions analogous to California Insurance Code section 10270.65:

1. Delaware:	Del. Code Ann. tit. 18 § 3127 Del. Code Ann. tit. 18 § 3529
2. Florida:	Fla. Stat. Ann. § 627.572(4) Fla. Stat. Ann. § 627.569
3. Hawaii:	Haw. Rev. Stat. § 431:10-215 Haw. Rev. Stat. Ann. § 431:12-111
4. Idaho:	Idaho Code § 41-2023 Idaho Code § 41-2205
5. Kentucky:	Ky. Rev. Stat. Ann. § 304.18-050 Ky. Rev. Stat. Ann. § 304.16-230
6. Maine:	Me. Rev. Stat. Ann. tit. 24-A § 2627 Me. Rev. Stat. Ann. tit. 24-A § 2812
7. Massachusetts:	Mass. Gen. Laws Ann. ch. 149, § 178E
8. Nevada:	Nev. Rev. Stat. Ann. § 689B.060 Nev. Rev. Stat. Ann. § 688B.180
9. New Jersey:	N.J. Stat. Ann. § 17B:27-53

10. Utah:	Utah Code Ann. § 31A-22-702
11. Virgin Islands:	V.I. Code Ann. tit. 22, § 912
12. Washington:	Wash. Rev. Code Ann. § 48.21.120
13. West Virginia:	W. Va. Code § 33-14-21
14. Wyoming:	Wyo. Stat. § 26-19-105 Wyo. Stat. § 26-174-12

(2)

No. 90-311

In The

Supreme Court of the United States

October Term, 1990

BATEMAN EICHLER, HILL RICHARDS, INCORPORATED, JOHN R. BOLIN, THEODORE W. PRUSH,

Petitioners,

v.

JOHN D. RUOCCO, on behalf of himself and as representative of a class of persons similarly situated,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the District Court, as affirmed by the Ninth Circuit Court of Appeals, properly determined that Respondent John Ruocco, as a former plan participant, had a "colorable claim" to the distribution of surplus from the employee-funded plan.

2. Whether the District Court, as affirmed by the Ninth Circuit Court of Appeals, properly found that California Insurance Code Section 10270.65 was preempted by ERISA, since that provision directly relates to the administration of group disability plans which ERISA mandates is wholly a federal concern.

3. Whether the District Court, as affirmed by the Ninth Circuit Court of Appeals, properly awarded attorneys' fees against the Defendants under ERISA, since the award was appropriate under Ninth Circuit guidelines, and Defendants' written objections to the award were properly rejected by the District Court.

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STATEMENT OF THE CASE

There are several omissions in Petitioner's recitation of the case which necessitate restatement.

First, on page 7 of their Petition, Petitioners claim that "[i]n accordance with section 10270.65 of the California Insurance Code," BEHR retained the distribution to recover some of the earlier costs and contributions which

BEHR itself had supposedly incurred in connection with all of its insurance programs. Not only is the commingling of assets from various company plans in violation of the trust requirements of ERISA, but it must be noted that defendants Bolin and Prush, the two individuals most responsible for the decision to appropriate the UNUM distribution, had never heard of section 10270.65 until after this litigation began.

Secondly, on page 8, while it is true that the District Court found that Petitioners had not breached their fiduciary duties or acted in bad faith, the Court specifically found that the actions of BEHR in retaining the UNUM distribution were "arbitrary and capricious." (See A26 to Petition).

REASONS FOR DENYING THE WRIT

There are several reasons why this writ should be denied. First, as both lower courts held, Ruocco had a "colorable claim to vested benefits" under the terms of ERISA. Although he was a former plan participant, he and not BEHR had paid for the disability coverage, and he was therefore entitled to receive his share of the extraordinary UNUM distribution.

Secondly, as both lower courts held, California Insurance Code Section 10270.65, which Petitioners claim supports their retention of the UNUM distribution, is preempted by ERISA since it directly relates to the administration of an employee benefit plan, an area which Congress intended to be solely a federal concern.

While it is true that many other states have similar insurance provisions on their books, it is crucial to realize that none of these statutes has been cited since the passage of ERISA.

Finally, the petition should be denied since the factual basis of this lawsuit was extremely unique, and there is no conflict in the circuits which justify this Court's review.

I. THE NINTH CIRCUIT PROPERLY UPHELD THE DISTRICT COURT IN FINDING THAT RUOCCO WAS A "PLAN PARTICIPANT" WHO HAD A "COLORABLE CLAIM TO VESTED BENEFITS."

Petitioners first claim that the district court had no jurisdiction over the ERISA causes of action since plaintiff Ruocco was not a "participant" of a welfare benefit plan as mandated by ERISA. This argument lacks merit.

ERISA defines a "participant" as: "any employee or former employee of an employer . . . , who is or may become eligible to receive a benefit *of any type* from an employee benefit plan. . . . " 29 U.S.C. §1002(7) (emphasis added). The clear language of this provision defines plaintiff Ruocco as a "participant" of the BEHR LTD Plan. Ruocco brought this suit on behalf of all BEHR employees, past and present, who participated in the BEHR LTD Plan between 1982-84. Simply stated, both lower courts have found that the defendants misappropriated approximately $630,000 of Plan benefits for their own use. As mandated by the clear language of ERISA, Ruocco is a "former employee . . . who is . . . eligible to receive a benefit of any type from an employee benefit plan." U.S.C. §1002(7).

In *Bricklayers' Health & Wel. v. Brick Masons' Health,* 656 F.2d 1387 (9th Cir. 1981), plaintiffs, including several

former members of the Brick Masons' Fund, sued their former trust fund to return surplus contributions made by the former participants which had been kept in a separate account. The defendants challenged the suit, claiming that plaintiffs had no standing to sue, since they were no longer "participants" in the plan. The Ninth Circuit summarily held that the former members of the plan were indeed "participants," concluding simply:

> [T]he former participants allege that they are entitled to receive certain benefits from the Brick Masons' Fund; they are therefore participants for jurisdictional purposes."

Id. at 1391.

In support of their argument, defendants continue to cite three cases which are inapposite to the issue at hand, including *Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654 (9th Cir. 1983), (claim by former employee for additional pension benefits dismissed in part because claimant never enrolled in the plan), and *Joseph v. New Orleans Elec. Pension and Retirement Plan*, 754 F.2d 628 (5th Cir.), *cert. denied*, 474 U.S. 1006 (1985) (retirees who had already received final lump sum distribution were denied additional benefits after plan was subsequently amended to increase potential benefits).

Petitioner relies most heavily on *Kuntz v. Reese*, 785 F.2d 1410 (9th Cir.), *cert. denied*, 479 U.S. 916 (1986) (*Kuntz II*) in which former employees who claimed that their employer had misled them as to the extent of benefits available under their pension plan sued for damages based upon this breach of fiduciary duty. As with *Joseph*, the plaintiffs in *Kuntz II* had already received their lump

sum termination benefits; further, the claimants in *Kuntz II* were not seeking the recovery of "benefits," as mandated by the explicit terms of ERISA; instead, they sought only damages for their employer's breach of fiduciary duty in misrepresenting the terms of their coverage under the plan. The Ninth Circuit properly held that such a claim did not constitute a claim for a "benefit of any kind," and thus denied standing. Such a factual scenario has no bearing on the current case, in which plaintiffs seek specific benefits – the UNUM surplus and profit from exercising the warrants – to which they, rather than BEHR, were unquestionably entitled.

BEHR's interpretation of *Kuntz II* has been summarily rejected by *Amalgamated Clothing & Textile Workers v. Murdock*, 861 F.2d 1406 (9th Cir. 1988), in which plaintiff were paid a lump sum after the termination of their benefit plan. Subsequently, the defendant misappropriated tens of millions of dollars from the plan surplus. Plaintiffs sued under ERISA for damages, as well as the disgorgement of the defendant's ill-gotten profits. The defendant argued, as BEHR does here, that *Kuntz II* forbids former plan participants from bringing a cause of action for damages for breach of fiduciary duty, since 1) they had already received lump sum benefits; and 2) such legal damages did not constitute "a benefit of any type" for purposes of ERISA, thus denying these former employees standing. The Ninth Circuit rejected this interpretation of *Kuntz II* with reasoning directly applicable to the present case:

> There is a critical different between *Kuntz* and the case before us. In *Kuntz*, the plaintiffs alleged that plan fiduciaries had "lied about the amount of benefits that plaintiffs would get

> under the plan. . . . " Unlike the case before us, the *Kuntz* plaintiff *did not* allege that the fiduciaries *personally profited* from a breach of their duty of loyalty to the plan.
>
> * * *
>
> It would be ironic if the very acts . . . that allegedly resulted in a fiduciary personally obtaining ill-gotten profits should also serve to deny plan beneficiaries standing . . . to redress the fiduciaries' alleged breach of duty of loyalty.

Id. at 1418.

In the current case, as in *Amalgamated*, the fiduciaries did personally profit from their breach of duty. The additional monies into BEHR's coffers aided not only BEHR, but the individual defendants as well, who gained additional bonus income as a result of their retention of the UNUM distribution. *Kuntz II* is therefore off point.

II. THE NINTH CIRCUIT CORRECTLY AFFIRMED THE LOWER COURT IN HOLDING THAT CALIFORNIA INSURANCE CODE SECTION 10270.65 IS PREEMPTED BY ERISA

Petitioners have argued throughout this litigation that their retention of the more than $629,000 in proceeds from the UNUM distribution was justified due to their interpretation of California Insurance Code Section 10270.65, a provision, which Petitioners were not even aware of until after plaintiff filed his original complaint. As both the District Court and the Ninth Circuit correctly found, this statute is preempted by ERISA.

In enacting ERISA, Congress meant to establish employee benefit plan regulation as "exclusively a federal concern," limited only by the terms of ERISA itself. *Pilot*

Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 1553 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Alessi v. Raybestos Manhattan Inc.*, 451 U.S. 504, 523 (1981). Accordingly, Congress enacted the broadest type of preemption clause, one which occupies the field of employee benefit plans to the exclusion of all state law. *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1215 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981). In enacting ERISA, Congress sought to "eliminate the threat of conflicting and inconsistent state and local regulations" relating to employee benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

Throughout this litigation, BEHR has argued that, notwithstanding the above authorities, the preemption provision of ERISA does not apply to Section 10270.65 because of the narrow exception to the preemption provision contained in 29 U.S.C. §1144(b)(2)(A), known as the "saving clause." However, this provision saves from preemption only those state laws which specifically relate to the *business* of insurance. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985); *Moore v. Provident Life and Accident Ins. Co.*, 786 F.2d 922, 926 (9th Cir. 1986). Specifically, it is restricted to state laws "regulating insurance companies and insurance contracts." *United Ford and Commercial Workers Employers Arizona Health and Welfare Trust v. Pacyga*, 801 F.2d 1157, 1159 (9th Cir. 1986); *Moore*, 786 F.2d at 926. It does not exempt state regulations relating to the administration of employee benefit plans, such as Insurance Code Section 10270.65. BEHR has continually tried to cloud the distinction between regulating insurance companies and regulating the administration of insurance plans. Yet, as noted by the court in *Eversole v.*

Metropolitan Life Insurance Co., 500 F.Supp. 1162, 1169 (C.D. Cal. 1980):

> "The distinction between laws regulating an [employee benefit plan] and laws regulating an insurance company from which the plan purchased the insurance *is fundamental.*" (emphasis added.)

In determining whether a state law falls under the saving clause as a law "regulating insurance," the Court has utilized case law interpreting almost identical language found in the McCarran-Ferguson Act, 15 U.S.C. §1011 *et seq*. Three criteria have been used to determine whether a practice falls under this provision:

> *First*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry, (emphasis in original.)

Pilot Life, 481 U.S. at ___, 107 S.Ct. at 1553-54 (quoting *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982)); *see also Pacyga, supra*, 801 F.2d at 1161.

Section 10270.65 of the California Insurance Code satisfies none of the elements of this test. First, Section 10270.65 does not transfer or spread the policyholder's "risk;" the state statute deals solely with the administration of certain plan assets, i.e., dividends and refunds, and how an employer in his fiduciary capacity must deal with these assets. It does not deal with the coverage under any policy, the terms and conditions of any policy, or the circumstances under which such "dividends and refunds" are to be paid in the first place.

Second, this state statute is not an "integral part of the policy relationship" between the insurer and the insured. The statute deals only with the relationship between the *policyholder* and the insured. Realistically, there was little relationship between the "insurer", (Unionmutual), and the "insured," (the BEHR employees participating in the plan). The BEHR employees had a "relationship" solely with BEHR and the BEHR LTD Plan; it was BEHR itself, as administrator and fiduciary of the Plan, which procured the policy from Unionmutual, and handled all necessary administrative functions under the policy. In a sense, BEHR acted to insulate the insurer from the insured by creating the BEHR LTD Plan. Section 10270.65 has nothing to do with the relationship between the *insurer* and the insured.

Third, the state statute in question is not limited to "entities within, the insurance industry" as mandated by the *Pilot Life* three-part test. By its terms, the statute in no way applies to insurance companies. Rather, the statute is aimed at any entity which holds or administers a group disability insurance policy on behalf of its employees. In fact, the state insurance code provision asserted by defendants has been found specifically not to apply to insurance companies, but solely to administrators of group policies. *See Keniston v. American National Insurance Company*, 31 Cal.App.3d 803, 810, 107 Cal.Rptr. 583 (1973) (obligations under this statute imposed upon employer/administrator of group policy, not insurance company). Thus, not only is the statute not "limited" to insurance companies, it is, by its language and case interpretation, inapplicable to such companies. As *Pilot Life* concludes:

> A common-sense view of the word "regulates" would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but be *specifically directed toward that industry.*

481 U.S. at ___, 107 S.Ct. at 1554 (emphasis added).

The cases cited by BEHR are inapposite. In *General Motors Corp. v. California State Board of Equalization,* 815 F.2d 1305 (9th Cir. 1987), the Ninth Circuit correctly "saved" from preemption new California Revenue and Tax Code provisions which permitted the state to impose a tax on gross premiums received by *insurance companies* doing business in California. Similarly, in *Metropolitan Life, supra,* the Supreme Court properly saved from preemption a state statute which mandated in inclusion of mental health care benefits in all insurance contracts, since the statute related to the "business of insurance." *Id.* at 740. Both of these opinions are consistent with the purpose of the saving clause, which is to leave to the states the "[regulation of] insurance companies and insurance contracts." *Pacyga, supra,* 801 F.2d at 1159. Neither case, however supports BEHR here, since the administration of benefit plans is solely a federal concern.

Simply stated, therefore, the "saving clause" has the very limited effect of saving from preemption state regulation of insurance companies and terms of insurance contracts – it does not exempt state regulation of employee benefit plans funded by the insurance industry. To claim that the saving clause exempts Section 10270.65 from preemption would have the effect of nullifying the entire preemption clause. Clearly, such a broad view of the saving clause is not warranted by either legislative

history or case law. It is of crucial importance to realize that with approximately twenty states with statutes similar to California's Section 10270.65, Petitioners do not cite a single one which has been cited as authority since the passage of ERISA. Congress did not intend to preempt state regulation of benefit plans and then exempt every regulation it just preempted. As this Court noted tongue-in-cheek in *Metropolitan Life:*

> "While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do so at the same time."

471 U.S. at 740; 105 S.Ct. at 2389. Section 10270.65 is preempted by ERISA.

III. THE NINTH CIRCUIT CORRECTLY AFFIRMED THE AWARD OF ATTORNEY'S FEES TO PLAINTIFFS

BEHR next argues that the district court improperly awarded attorney's fees to plaintiffs, arguing that such an award is intended to punish or deter improper actions by plan administrators, and that since the District Court found no specific breach of fiduciary duty, the awarding of fees was improper. Such a claim is also meritless.

An award of attorney's fees under ERISA must be upheld on appeal unless defendants can demonstrate that the district court abused its discretion. *Monkelis v. Mobay Chemical,* 827 F.2d 935 (3rd Cir. 1987); *Firestone Tire and Rubber Co. v. Neusser,* 810 F.2d 550 (6th Cir. 1987). An abuse of discretion exists only when the Court has the "definite and firm conviction" that the district court made a clear error of judgment in its conclusion upon

weighing relevant factors. *Secretary of the Department of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985).

Petitioners are correct that the Ninth Circuit relies upon the factors set forth in the case of *Hummell v. S. E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980), in determining whether the awarding of attorneys' fees to a party is warranted. In the Statement of Uncontroverted Facts and Conclusions of Law, signed by the Court over written objection by the defendants, the *Hummell* factors are analyzed in the context of this case:

> The defendants have the ability to satisfy the awarding of attorney's fees in this litigation, and the awarding of fees will hopefully deter other individuals and entities faced with a similar situation from acting in such an arbitrary and capricious manner. It is further noted that plaintiff John Ruocco was seeking to benefit all participants of the BEHR Ltd Plan, and also sought to resolve significant legal questions concerning ERISA, specifically involving the distribution of surplus assets, and the parameters of federal preemption. For all of these reasons, the Court finds the awarding of attorney's fees in this case to plaintiff is appropriate and reasonable.

(Pages A26-27 to Petition). Petitioners argue that the award of fees was improper since there was no finding of "bad faith" by the District Court. This argument is specious for two reasons. First, the degreed culpability is only one of many factors to consider in awarding fees under ERISA. Secondly, bad faith is not a prerequisite to an award of attorney's fees. *See Tabac v. Kinney*, 672 F.Supp. 334 (N.D. Ill. 1987); *Hollenbeck v. Falstaff*, 605 F.Supp. 921 (D.C. Mo. 1984), *aff'd* 780 F.2d 20 (1985). The

district court did not abuse its discretion in awarding fees in this case.

CONCLUSION

Both the District Court and the Ninth Circuit Court of Appeals have found that Defendants' retention of the UNUM distribution was improper. Contrary to Petitioner's representations, the decision of the lower courts has in no way "diminished the authority traditionally belonging to the states. . . . " Instead, both lower courts have recognized, as was Congress' intent, that the administration of group insurance policies is of such national importance as to necessitate a single set of rules to oversee these programs. Petitioners' arguments are inappropriate. As such, Respondents respectfully request this Court to deny this Petition for a Writ of Certiorari.

Respectfully submitted,

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